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Hon. Marla J. Luckert
Chief Justice, Kansas Supreme Court
Chair, Kansas Judicial Council
Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, KS 66612

Re: Pattern Jury Instructions for Kansas — Criminal and Civil

Dear Chief Justice Luckert:

We write as counsel for Public.Resource.Org (“Public Resource”), a 501(c)(3) non-profit corporation based in California. We write regarding your past correspondence with Carl Malamud, President of Public Resource. The mission of Public Resource is to enhance public access to government information and public law. As you may be aware, Public Resource has made significant strides in pursuit of this mission, including a recent victory at the United States Supreme Court regarding public access to annotated state codes. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). That case makes clear that edicts of government cannot be copyrighted by states and that there is a strong public interest in broad access to such edicts.

We write specifically to urge the State of Kansas to remove barriers to access that the State has impermissibly put in place with respect to the Pattern Jury Instructions for Kansas — Criminal and Civil (the “PIK”), developed and promulgated by the Kansas Judicial Council (the “Council”), of which you are the Chair. At present, the PIK is only freely available to registered Kansas attorneys, while the rest of the public must pay an expensive fee in order to gain access. Even for those non-lawyer citizens that can afford the PIK, these materials are not easily accessible to the visually impaired and are hard to find and navigate.

Overview and Background

Our client has made the PIK, and model jury instructions from eighteen other states, publicly available and digitally accessible on the non-profit Internet Archive (<https://archive.org>) at the following location:

<https://archive.org/details/JuryInstructions>

The collection offered by Public Resource has several features that make the edicts of government contained therein more useful. Books containing model jury instructions are scanned and then undergo several operations, such as Optical Character Recognition or “OCR,” to convert typed text into machine-coded text. Public Resource uses custom open-source software code to create modern HTML files, making the materials more usable for the visually impaired. In the “subject and topics” pane accessible in the collection, a user may click on a particular state name to find materials for that jurisdiction. There is also the capability to search inside the texts across the entire collection, allowing a user to enter a search term such as “eviction”:

<https://archive.org/details/JuryInstructions?query=eviction&sin=TXT>

The search identifies any volumes containing that search term. When the user clicks on a volume, it will open to the relevant page that contains the term; “pins” below the book identify other pages that have that word or phrase.

Public Resource is working with legal informatics clinics to make the collection even more usable, using big data and machine learning technologies to identify similar jury instructions in different states. By allowing such research efforts, our client expects to see even more improvements in accessibility and usability of the instructions. All of these materials are easily found on the world wide web using search engines such as Google or Bing.

The Pattern Jury Instructions for Kansas

The PIK is an invaluable tool of democracy in the State of Kansas. In making the PIK accessible to the broader public, Public Resource hopes to facilitate widespread participation in the Kansas legal system. The jury is a key component of a fair and accessible judicial system in the United States. The widescale availability of the Pattern Jury Instructions for Kansas, therefore, contributes to fair and accessible justice in the State of Kansas. The PIK constitutes the best plain-language statement of the law as concerns charging of juries in civil cases in the State.

The Court has emphasized that the PIK “should be the starting point in the preparation of any set of jury instructions.” *State v. Dixon*, 209 P.3d 675, 690 (Kan. 2009). Its value is certainly as high as the Court’s guidance indicates. This value can only be fully realized through greater accessibility.

The Supreme Court of Kansas has emphasized for decades that while use of the PIK is not required, it is “strongly recommended.” *State v. Butler*, 416 P.3d 116, 130 (Kan. 2018). Given the quality of the PIK, its integration into the Kansas judicial system is natural. The Court has even said that absent a need for modification, “PIK instructions and recommendations should be followed,” and that refusing to use the PIK can “[create] problems.” *State v.*

Pioletti, 785 P.2d 963, 971 (Kan. 1990). Because the PIK is so ingrained in the Kansas judicial system, its goals can only be accomplished through widespread availability to the public.

Edicts of Government Doctrine

As you are no doubt aware, because the PIK was issued in the name of the Kansas Judicial Council and created by judges in the course of their judicial duties, it is not eligible for copyright. The American legal system operates on the assumption that every citizen knows the law. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). Thus, it follows that all citizens should have free access to the contents of the law. *Id.* The U.S. Supreme Court has given effect to this principle through the articulation of the government edicts doctrine. *Id.*

The Copyright Act grants monopoly protection for “original works of authorship.” 17 U.S.C. § 102(a). Effectively, this means that, to be copyrightable, a work must have a copyright-eligible author. Under the government edicts doctrine, officials empowered to speak with the force of law are not copyright-eligible authors of the works they create in the course of their official duties. *Georgia*, 140 S. Ct. at 1501. Thus, such government work product is excluded from copyright protection. *Id.* at 1504.

The government edicts doctrine, as it exists today, emerged from a trio of Supreme Court cases decided in the 19th century. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

These three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. In our client’s recent case against the State of Georgia, the United States Supreme Court extended the application of the government edicts doctrine to include works created by legislators acting in their role as legislators. *Id.* at 1505.

In the 2020 *Georgia* decision, the Court clarified that the relevance of the government edicts doctrine to a particular work rests on the identity of the author rather than whether the work carries the force of law. *Id.* at 1506. Thus, it is not required to determine which materials constitute “the law,” because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id.* In effect, this means that the doctrine applies not only to final legislation but also to explanatory and procedural materials that legislators create in their official duties (including but not limited to model jury instructions). *See id.* at 1508.

Under Supreme Court precedent, then, copyright protection cannot exist in works that, like the PIK, are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. *Id.*

The Council

The PIK was created by judges and legislatures in the course of their official duties. More specifically, it was authored by the Kansas Judicial Council, which the Kansas legislature established by statute in 1927. Most of the Council's ten members are judges and lawyers appointed by the Chief Justice of the Supreme Court. The remaining members are sitting representatives in the Kansas House and Senate. Therefore, the PIK falls under the above framework and is ineligible for copyright protection.

Furthering comprehension of the judicial system is a necessary function of judgeship. In the creation of the PIK, Kansas judges drew upon their professional experience to fulfill a professional duty.

The Kansas Judicial Council website lays out how the Kansas legislature established the Council to study the judicial branch of the government and to recommend options for improvement in the administration of justice to both the Legislature and the Supreme Court. The Chief Justice of the Supreme Court appoints eight of the body's ten members, including several judges, and the final two members are the Chairs of the House and Senate Judiciary Committees.

The Council's projects are assigned by the legislature and requested by the Supreme Court. The creation of the PIK is one of these projects, and the Court strongly encourages its use.

The Commission in Georgia was so intertwined with the state's legislative branch that, although the Court recognized that it was not identical to the branch, it was functionally a part of the branch. Like that Commission, the Kansas Judicial Council was created by the state's legislature, for judicial and legislative purposes, and functions under judicial and legislative supervision. Indeed, this endorsement is the source of the Council's authority.

For these reasons, the Council is functionally a part of both the legislature and the judiciary, and the PIK was created as part of its authors' legislative and judicial duties. It is therefore ineligible for copyright protection.

Conclusion

The commitment shown by those involved in creating the PIK is a testament to their devotion to the law and public service. The intentions of those involved in the work would be best served through offering public access to these instructions, so that all may benefit from the knowledge that they have thoughtfully shared.

Particularly at a time when our nation's legal system has come under substantial scrutiny from all sides, a commitment to transparency and openness in the law is crucial to restoring public confidence. Those in the legal system should strive to eliminate barriers to

information that should be widely available. Removing the claims of copyright protection on the PIK would be an invaluable step in this direction.

We hope you will agree that the entire public should be able to enjoy the benefits of the PIK. Currently, the PIK provides an inaccurate copyright notice that purports to vest ownership in the Kansas Judicial Council. For the reasons explained, the PIK is not eligible for copyright protection. Therefore, we ask that you:

1. abandon and withdraw all copyright claims from the PIK as well as from the web site of the Kansas Judicial Council; and
2. support efforts to provide public access to these important edicts of government.

Along with Public Resource, we would be more than happy to discuss this with you or your staff. Thank you for your time and attention.

Respectfully submitted,



Christopher T. Bavitz

cc: Carl Malamud
President, Public Resource

David Halperin
Of Counsel, Public Resource